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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/664,383	09/17/2003	Michael Paul Gividen	F3317(C)	4419

201 7590 09/21/2009
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EXAMINER

ALEXANDER, REGINALD

ART UNIT	PAPER NUMBER
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3742

NOTIFICATION DATE	DELIVERY MODE
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09/21/2009

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL PAUL GIVIDEN, REBECCA JULIA LEWIS, and
LAURENCE JOHN SMITH

Appeal 2009-002689
Application 10/664,383
Technology Center 3700

Decided: September 17, 2009

Before JENNIFER D. BAHR, LINDA E. HORNER, and
STEFAN STAICOVICI, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Michael Paul Gividen et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1, 4, 5, 10, 13, and 14. Claims 2, 3, 6-9, 11, 12, and 15-18 have been canceled. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

Appellants' invention is drawn toward a container 8 in which infused liquid beverages (*i.e.*, tea) are dispensed, including a lid 1 having an aperture 7 that allows the string 11 of a teabag 10 to pass therethrough, and slits 6 and 14 extending at right angles for gripping the string 11. Spec. 1, ll. 3-4; Spec. 4, ll. 15-16; Spec. 5, ll. 14-16; and figs. 3 and 6.

Claim 1 is representative of the claimed invention and reads as follows:

1. A container for serving infused liquid beverages made from infusion bags having a string and tag attached, said container comprising a receptacle for holding liquid, a lid for the receptacle provided with an opening having a first portion which is capable of gripping the string of the infusion bag and a second portion located on the first portion through which the string of the infusion bag can move into and out of the container, and a dispensing outlet through which the consumer drinks the beverage wherein the first portion comprises a first slit with further slits that extend at right angles therefrom and that are aligned with the second portion, further wherein the first slit with further slits results in four right angles.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Yip	US 4,602,557	Jul. 29, 1986
Portman	US 6,464,099 B1 ¹	Oct. 15, 2002

Appellants seek review of the Examiner's rejection of claims 1, 4, 5, 10, 13, and 14 under 35 U.S.C. § 103(a) as unpatentable over Portman and Yip.

THE ISSUE

The Examiner found that Portman discloses all the features of independent claims 1 and 10 with the exception of a lid having a plurality of slits that are perpendicular to each other such as to form four right angles. Ans. 3. The Examiner further found that Yip discloses a teabag string gripper member 24d' having perpendicular slits forming four right angles. *Id.* The Examiner concluded that it would have been obvious to a person of ordinary skill in the art to modify the slit formation of Portman according to Yip "in order to provide an alternative arrangement for gripping the string and supporting a tea bag." Ans. 4.

¹ The Examiner's Answer first points to U.S. Patent No. 6,742,670, issued Jun. 1, 2004, as the "Portman" reference used as evidence of unpatentability. Ans. 2. Then, the Examiner relies on the teachings of Portman, U.S. Patent No. 6,464,099, issued Oct. 15, 2002, to reject claims 1, 4, 5, 10, 13, and 14 under 35 U.S.C. § 103(a) as unpatentable over Portman and Yip. This is consistent with the Final Rejection, at page 2, which relies on "Portman '099" in the rejection. Additionally, Appellants understand the rejection to be based upon U.S. Patent No. 6,464,099. App. Br. 6. As such, for the purpose of this appeal, we have considered U.S. Patent No. 6,464,099 to be the "Portman" reference.

Appellants argue that the Examiner's proposed combination "would result in a defective and leaking container." Br. 10. Specifically, Appellants argue that if the notches 24a or 24b of Yip were made in the container of Portman, as suggested by the Examiner, the container would not be functional because it would leak. *Id.* Accordingly, Appellants argue that there is no motivation to combine the teachings of Portman and Yip. *Id.*

In response, the Examiner acknowledges that the slits of Yip are in a cup side. Ans. 4. Nonetheless, the Examiner takes the position that the rejection of claims 1, 4, 5, 10, 13, and 14 over the combined teachings of Portman and Yip is based on the geometrical arrangement of Yip's slits, that is, forming four right angles, and not on their location on a cup side. *Id.*

Accordingly, the issue presented for our consideration is as follows:

Have Appellants demonstrated that the Examiner erred in determining that the combined teachings of Portman and Yip would have prompted a person of ordinary skill in the art to arrange the slits of Portman such as to have four right angles as taught by Yip?

SUMMARY OF DECISION

We AFFIRM.

PRINCIPLES OF LAW

Obviousness

It is elementary that to support an obviousness rejection all words in a claim must be considered in judging the patentability of that claim against the prior art. *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970).

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at 407 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.")

OPINION

Appellants argue the rejection under 35 U.S.C. § 103(a) of claims 1, 4, 5, 10, 13, and 14 together as a group. Br. 7-10.² Therefore, in accordance with 37 C.F.R. 41.37(c)(1)(vii)(2008), we have selected claim 1 as the representative claim to decide the appeal, with claims 4, 5, 10, 13, and 14 standing or falling with claim 1.

² The separate headings presented on Pages 8 and 9 of the Brief merely recite the limitations of claims 1, 5, 10, and 14, without presenting any separate arguments for patentability of these claims. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2008) ("A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.")

Although we appreciate Appellants' argument that if the notches 24d' of Yip were made in the container of Portman the container would leak, it is not directed to the modification actually proposed by the Examiner, and thus is not persuasive. Obviousness does not require that all of the features of the secondary reference be bodily incorporated into the primary reference. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Moreover, the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment. *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984).

In this case, we find that Portman discloses a container 11, including a cover panel (lid) 22 having an aperture 61 that allows the string 17 of a teabag 15 to pass therethrough, and incisions (slits) 47 angled from opening 61 for retaining (gripping) the string 17. Portman, col. 18, l. 48 through col. 19, ll. 48-57; col. 19, ll. 14-19; and fig. 1C. We further note that the incisions (slits) 47 of Portman form four angles in an X-shape arrangement. We further find that Yip discloses a cup 10 having a notch 24 for receiving and retaining the string 26 of a teabag 28. Yip, col. 2, ll. 66-68 and fig. 3. Furthermore, in Figures 4-6, Yip discloses a wide variety of notch arrangements. Among these arrangements, we find that Yip discloses a similar X-shaped notch arrangement 24q' as that of Portman, and also a cross-shaped (+) notch arrangement 24d' that forms four right angles, as required by claim 1. Yip, figs. 4q and 4d. Therefore, we find that it would have been well within the level of ordinary skill in the art to replace the X-shape incision (slit) arrangement of Portman with a cross-shaped (+) arrangement, as suggested by Yip, because it is no more than "the simple substitution of one known element for another." *KSR*, 550 U.S. at 417.

After all, "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *Id.* at 421.

Lastly, Appellants argue that the container of Portman is deficient when compared to Appellants' container because the lid "requires a different pull or different tension" when a consumer desires to retain the bag within the lid. Br. 10. First, we agree with the Examiner that Appellants' argument appears to be functional in nature and as such is not structurally limiting. Ans. 5. Second, we find that Appellants' argument appears to attack the teachings of Portman individually rather than the combination of Portman and Yip. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

For the foregoing reasons, Appellants' arguments do not persuade us that the Examiner erred in rejecting claim 1 as unpatentable over the combined teachings of Portman and Yip. Accordingly, the rejection of claim 1, and claims 4, 5, 10, 13, and 14, standing or falling with claim 1, is sustained.

CONCLUSION

Appellants have failed to show that the Examiner erred in determining that the combined teachings of Portman and Yip would have prompted a person of ordinary skill in the art to arrange the slits of Portman such as to have four right angles as taught by Yip.

Appeal 2009-002689
Application 10/664,383

DECISION

The Examiner's decision to reject claims 1, 4, 5, 10, 13, and 14 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

mls

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